WONG YEE CHEONG & ANOR.

v.

TOH SENG CHUAN

HIGH COURT MALAYA, MUAR
EUSOFF CHIN J
[CIVIL SUIT NO. 105 OF 1984]
1 MARCH 1988

TORT: *Whether 1st plaintiff contributorily negligent by riding too close to the centre of the road - Quantum of damages.*

On 9 January 1984 at about 9.30 pm, at about the 3rd mile Muar/ Bari Road the 1st plaintiff was involved in an accident with a oncoming car driven by the defendant. The plaintiff was riding his motorcycle about 4 to 5 feet from the left edge of the road and said the defendant had encroached over the plaintiff's side of the road in order to overtake a car in front of the defendant. The defendant alleged that he was not overtaking any car but admitted that driving his car's offside wheels on the centre white of the road.

The 1st plaintiff suffered the following injuries:

1. fracture of frontal bone
2. amputation of right arm at mid arm level
3. brachial plexus injury to the left arm rendering the left hand functionless
4. fracture of right femur, tibia and fibula, mid tarsal injury to the right foot and sciatic nerve paralysis which resulted in 6.5 cm shortening, wasting of muscles, gross restriction of the foot and toes
5. multiple lacerations and abrasions
6. multiple scars on frontal region, the abdomen, pelvis and the right leg.

Held:

[1] Where there is no cyclist or pedestrian ahead of him a prudent motorist or motorcyclist should always drive as close as possible to his left edge of the road and in the instant case on the evidence the plaintiff was found 30% to blame and the defendant 70%.

[2] The 1st plaintiff was awarded the sum of RM313,313.80 being 70% of the total general and special damages and the 2nd plaintiff was awarded RM1,000 as special damages for the loss of the motorcycle.

[Plaintiff found 30% liable. Defendant 70%.]

Cases referred to:

Chang Kam Nan v. Ludhiana Transport Syndicate [1950] MLJ 299
Chan Hon Fah v. Khoo Hoon Ann [1988] 1 CLJ (Rep) 428
Othman v. Foo Chew Hong [1986] 2 MLJ ccxi
Lee Eng Beng v. Thorairajah [1986] CLJ (Rep) 173
Lim Kiat Boon v. Lim Sue Kong [1980] 2 MLJ 39
Kow Ah Dek v. Retnasingam [1981] 2 MLJ 24

For the plaintiff - E.T. Tee; M/s. Murphy & Dun bar
For the defendant - C.S. Loh; M/s. Vincent Lai & Co.

JUDGMENT

Eusoff Chin J:

On 9 January 1984 at about 9.30 p.m. the plaintiff was riding his motorcycle to go to his house at 3½ mile Muar/Bakri road. At about the 3rd mile stone he was involved in an accident with an on coming car driven by the defendant. The plaintiff was riding his motorcycle about 4 to 5 feet from his left edge of the road. He said that the defendant's car went over to the plaintiff's side of the road in order to overtake a car ahead of the defendant's car. At that time the plaintiff was about 15 feet from the defendant's car and the plaintiff could not do anything to avoid the accident. The defendant said he was not trying to overtake any vehicle ahead of him. He admitted driving with his car's off side wheels on the centre white line of the road as he usually did when travelling at night to avoid going off the road.

In my view when a person drives a motor vehicle on a road pitted with pot holes, it is better to drive as slow as possible to avoid serious damage to his vehicle steering and suspension systems and discomfort to the driver/passengers, and where the circumstances permit, to keep as close as possible to his left side of the road. To drive in the centre of the road just to avoid running over pot holes is certainly courting an accident. Of the two choices, it is prudent for a person to run the risk of sustaining damage to his vehicle than to get his head crushed in an accident with another vehicle. In the instant case, the plaintiff had taken the second choice, and thereby suffered serious injuries to himself.

On the other hand, the defendant had admitted that as a matter of practice, when driving at night, he drives with his off side wheels on the centre white line to avoid going off the road. Now and then he would wonder off the white line. This is certainly a dangerous practice because if he drives fast it requires the fullest concentration to avoid the car wondering or encroaching into the other half of the road. It is public and common knowledge that the full width of a vehicle (a car or a lorry) is greater then the width of the vehicle measured between the tyres on the same axle. Therefore by driving with his offside wheels on the centre white line, even if he can keep those wheels on the white line all the time which is not possible, part of his vehicle would have encroached to the other side of the road. The centre white line is painted on a road to indicate to a motorist which portion is his proper side of the road.

If two stubborn motorists coming from opposite directions were to drive with their off side wheels on the centre white line, and sticking to it hoping that the other would give way, one can imagine the disaster caused to them when the two vehicles meet.

Where there is no cyclist or pedestrian ahead of him a prudent motorist or motorcyclist should always drive as close as possible to his left edge of the road, and, as Abot J said in *Chang Kam Nan v. Ludhiana Transport Syndicate* [1950] MLJ 299, the driver of every vehicle ought reasonably to anticipate an accident although it may never occur.

The evidence and photographs show that the plaintiff's motorcycle was damaged on the front part, and the defendant's car was damaged on the side of its front offside mudguard. This shows that it was not a head on collision. The police sketch plan shows glass pieces were scattered in the centre of the road, more on the plaintiff's side than on the defendant's side. According to the defendant, this was because he had moved his car a little to the right on impact. The plaintiff said there were pot holes near the left edge of the road and therefore he had to travel 4 to 5 feet more to the centre of the road to avoid the pot holes. The width of the road was 20 feet. The evidence shows that the road was busy with traffic at the time of accident. On the evidence, and for the reasons given above, I find that the plaintiff is 30% to blame, and the defendant 70%.

Quantum

The plaintiff had suffered the following injuries in the accident;

1. fracture of frontal bone;
2. amputation of right arm at midarm level (above the elbow);
3. brachial plexus injury to the left arm rendering the left hand functionless;
4. injuries to the right leg consisting of fracture to the right femur, tibia and fibula, midtarsal injury to the right foot and sciatic nerve paralysis which resulted in 6.5 cm. shortening, wasting of the muscles, gross restriction of movements of the knee and ankle, gross restriction of the foot and toes due to sciatic nerve paralysis (footdrop);
5. multiple lacerations and abrasions;
6. multiple scars on frontal region (16cm. & 4cm.), the abdomen and pelvis (6cm. & 9cm.) and the right leg (20cm., 10cm. x 10cm., 15cm., 2cm. x 10cm.)

General Damages

(For pain and suffering and loss of amenities).

Both parties have cited a host of authorities on previous awards given by the Courts.

For injuries in items (1) and (2), both parties have agreed to RM5,000 and RM50,000 respectively.

For injuries in item (3), I award RM40,000 since only the portion below the wrist is completely functionless, and the plaintiff is still able to flex his elbow up to 60% of that of a normal person.

For injuries in item (4), in *Chan Hon Fah v. Khoo Hoon Ann* [1988] 1 CLJ (Rep) 428, a sum of RM35,000 was awarded for fractures of the femur, tibia, fibula and humerus with 5 cm. shortening. In *Othman v. Foo Chew Hong*, [1986] 2 MLJ ccxi, a sum of RM39,000 was awarded for fractures of femur, fibula and 5 cm. shortening. In the case before me the injuries are more serious. I award RM40,000.

For lacerations in item (5), I award RM2,000.

For the permanent scars in item (6), I award RM8,500.

The total sum awarded for the injuries suffered by the 1st plaintiff comes to RM145,500.

Following the decisions in *Lee Eng Beng v. Thorairajah* [1986] CLJ (Rep) 173, I scale down the figure to RM130,950 for overlapping.

Special Damages

A. For items (a) to (g) and for medical expenses, the parties have agreed to a sum of RM2,470.

B. Cost of 15 pints of blood for blood transfusions while the plaintiff was in hospitals.

The evidence shows that the members of the plaintiff's family were required by the hospital authorities to replace the blood used on the plaintiff. They were however not threatened with any penalty if they could not do so. But the members of the family had spent money to pay their friends to donate their blood to replace the 15 pints used on the plaintiff at an average of RM150 per pint the amount came to RM2,250. The learned Counsel for the plaintiff urged the Court to allow this item since it is an open secret that persons receiving blood

transfusions in Government hospitals are normally required to replace the amount of blood used on them or they may not get vital blood transfusion for survival. I quite appreciate their dilemma.

Although it is morally reprehensive for blood donors to ask for payments, it is certainly not morally reprehensive for a person to obtain blood by such means under compulsion and necessity in order to save live. But it is against Government and public policy for people to sell their blood, and the Courts should not encourage such an immoral practice. For that reason, with great reluctance, I have to reject this claim.

Pretrial Loss of Earnings

The income tax returns for the year 1983 submitted by the plaintiff to the Income Tax Department before the accident happened, was based on his earnings for the year 1982. It showed his total earnings was RM15,738. The tax payable by him was RM832. The average monthly income is RM15,738 - RM832 / 12 = RM1,242.

The plaintiff was a carpenter working in a furniture factory. In his present condition, he has been unable to secure any employment since the date of accident. I award him RM62,000 as pretrial loss of earnings. However during this period, he had received from his employer RM8,350 and following *Lim Kiat Boon v. Lim Sue Kong*, [1980] 2 MLJ 39, the plaintiff is hereby ordered to pay back this amount to the employer.

Cost of Artificial Limb

The plaintiff is 27 years old. The average life span of a male person in this country is 62 years. He would be expected to live for the next 35 years. I would deduct one third for contingencies, which gives a figure of 24 years. As a result of the accident he had his right arm amputated above the elbow. It is not disputed by the defence that the plaintiff needs an artificial right arm.

Evidence shows that the artificial limb costs RM13,000 per unit, and has a life span of 6 years. Certain parts of the artificial limb need replacement, and these parts have varying life spans.

The plaintiff would require 4 artificial limbs for the next 24 years. This would costs 4 x RM13,000 = RM52,000.

Working on a yearly basis the replaceable parts of the artificial limbs would cost:

1. fibre glass sockets
   (RM600 divided by 3 years of life span) ... RM200
2. cosmetic gloves
   (RM400 x 2 - life span 6 months) RM800
3. batteries
   (RM50 x 2 life span 6 months) RM100
4. Straps
   (RM50 life span 1 year) RM 50
5. wire
   (RM30 divided by 2 - life span 2 years) RM 15

The costs of replacing the parts would for 24 years come to RM1,165 x 24 = RM27,960

Total cost of artificial limb and replacement parts come to RM52,000 + RM2,796 = RM79,960

The plaintiff need to use for his shortened right lower limb one unit of above knee caliper with ring lock and one surgical boot the total cost of which is RM660. The set lasts for 3 years. The caliper has to be serviced yearly and the shoe had to be repaired and mended due to wear and tear during walking. This yearly servicing and mending would cost RM100. The plaintiff would require 8 units of above knee calipers and surgical shoes for the period of 24 years, which comes to 8 x RM660 = RM5280 and RM100 yearly maintenance cost for 24 years which comes to RM2,400, making a total of RM7,680.

Future Loss of Earnings

Mr. C.S. Loh for the defendant had agreed that, in his present condition, the plaintiff, could at the most earn RM200 p.m. The plaintiff's earning capacity had been reduced by RM1,040 p.m.

In *Kow Ah Dek v. Retnasingam* [1981] 2 MLJ 24, the Supreme Court decided that 5 years of partial future loss of earnings for a teacher should be given after his retirement at 55 years of age. The plaintiff's father who is 60 years old is still working in the furniture factory. I think it is not unreasonable to say that a carpenter has a useful working life of up to 60 years of age. The plaintiff is now 27 years old. Taking his retirement age to be 60 years, and deducting one third for contingencies, the appropriate number of years' purchase is 22. Using the actuary table, the figure is RM164,274.

To sum up, the damages awarded to the 1st plaintiff are:

A. *General Damages*

1.	pain and suffering and loss of amenities	RM130,950
2.	cost of artificial limb, renewals of replacement parts ...	RM 79,960
3.	cost of above right knee calipers, shoes and servicing ...	RM 7,680
4.	partial future loss of earnings	RM164,274

Interest at 6% p.a. on item(1) from date of service of writ to date of judgment. No interest on item (2), (3) and (4).

B. *Special Damages*

1.	Agreed special damage	...	RM 2,470
2.	Pretrial loss of earning	...	RM62,000

Interest at 3% p.a. from date of accident to date of judgment.

The general and special damages totals to RM447,334 and the plaintiff will get 70% of this which is RM313,313.80.

As regards the 2nd plaintiff's claim for the cost to his motorcycle which the 1st plaintiff used when he met with the accident, the repair costs would be about RM1,000. He decided to sell it for RM150. It was RM1,640 when he bought it new about one year before the accident. I award him RM1,000 as special damages at 3% p.a. from date of accident to date of trial.

Costs to the plaintiffs to be agreed or taxed.

Also found at [1988] 2 CLJ 624